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PROTECTION OF LGBTQ AND REFUGEES: ADDRESSING PERSECUTION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY IN INTERNATIONAL REFUGEE LAW

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ABSTRACT

Lesbian, homosexual, and bisexual migrants have unique challenges while appealing for asylum, which are constantly changing. As one issue is resolved, another arises. This article gives a historical review of these changes and explains how attempts to incorporate lesbian, gay, and bisexual persons and their experiences have changed shame into an implicit legal obligation in certain nations. In the contexts this study examined, the Difference, Stigma, Shame, and Harm (DSSH) model has arguably resulted in a set of legal requirements that emphasize suffering and internalized homophobia, despite the fact that its implementation was intended to encourage open-ended discussions about the fluidity of sexual orientation. The purpose of this study is to investigate the main issues brought up by previous research on the specific violence, adversity, and intersectional discrimination LGBTQI+ refugees and asylum seekers encounter throughout the application and processing stages. Furthermore, it aims to raise awareness of the role that public policies play in advancing and protecting social inclusion and rights, both for this acronym and for this particular population segment as a whole, which comprises a fairly diverse population in need of innovative policies for full inclusion.

KEYWORDS: Sexual orientation, refugees, gender, asylum, LGBTQ+, protection, lesbian, gay

INTRODUCTION

Throughout their lives, LGBTQI+ refugees and asylum seekers endure great pain. Their struggles are not limited to the negative impacts of systematic violence, sociocultural stigma, and forced migration because of sexual orientation, gender identity or expressions, and sex characteristics (SOGIESC). Their mental health and general well-being are adversely affected by the lengthy asylum procedures in host nations. Finding, analysing, and synthesizing the

evidence from qualitative data about the mental health status of LGBTQI+ forced migrants before to, during, and following resettlement was the aim of this systematic review. According to the Independent Expert, "the trauma and persecution for many LGBTI people begin long before their actual flight to safety." "Persecution frequently takes the form of discriminatory laws that criminalize sexual alignment, gender distinctiveness, or appearance."¹

Persecution of individuals due to their gender identity and sexual orientation is not a recent occurrence, and an increasing number of claims based on this basis has made decision-makers more cognizant of the unique experiences of LGBTQI+ asylum seekers and more interested in the legal issues at hand. The UNHCR has created country-specific standards for asylum eligibility that reflect the particular risk profiles of LGBTQI+ people in an effort to comprehend and address their particular protection needs.

SEXUAL ORIENTATION HURDLES IN THE HISTORY OF ASYLUM CLAIMS

The main legal advancements in LGB asylum applications from the late 1970s onward are outlined in this section. It aims to demonstrate how sexual orientation has evolved throughout time and what has, in reality, been safeguarded. Its explanation is intended to shed further light on the reasons for the DSSH model's implementation and offer a framework for examining its evolution.

DISCRETIONARY REASONING

Although some of the earlier instances involving LGB asylum seekers included discretionary reasoning, the concept's debate and criticism reached its zenith in the years surrounding the year 2000.³³ The concept of "discretion," sometimes known as "concealment," holds that candidates should modify their behaviour and appearance to avoid being seen by their surroundings as LGB individuals in order to escape persecution in their home country. Before the matter pertaining to certain social groups was resolved, it would seem that the discretion argument was already in play.

¹ Geneva, UN rights experts urge more protection for LGBTI refugees, United Nations Human Rights, (<https://www.ohchr.org/en/press-releases/2019/06/un-rights-experts-urge-more-protection-lgbti-refugees>)

TYPES OF PERSECUTION AND TYPICAL RISK FACTORS ASSOCIATED WITH GENDER IDENTITY OR SEXUAL ORIENTATION

a. **Negative Effects LGBTIQ+ People Face**

Questions about the persecution element of the refugee criteria may arise from asylum applications made by people with a variety of sexual orientations and gender identities. Persecution, according to the Handbook, is defined as a danger to life or freedom or other grave human rights breaches because of one's ethnicity, religion, nationality, political beliefs, or affiliation with a certain social group. Persecution can include a variety of physical, sexual, and psychological abuses, such as punishment for breaking societal norms, rape, psychological abuse, personal or familial violence, and harmful cultural practices. Thus, persecution occurs when someone can demonstrate that they have been the victim of, or have reasonable fear of, grave human rights breaches because of their gender identity or sexual orientation.

b. **Sexual assault** may be considered persecution and includes, among other abuses, forced pregnancy, forced sterilization, and rape. In addition to being a form of torture and cruel, inhuman, or humiliating treatment, trafficking for the purpose of forced prostitution or sexual exploitation may also be deemed persecution. Particularly vulnerable to effects "that restrict autonomy in decision-making about sexuality, reproduction, and family life" include lesbians, bisexual women, and transgender individuals.

c. **Criminalizing same-sex relationships** is against international human rights standards and is discriminatory.² People who are tried under such persecutory laws risk the death penalty, lengthy jail sentences, or severe physical punishment. Even though they are seldom implemented, these laws can result in an oppressive atmosphere for LGBTIQ+ people by making them fear prosecution, giving them a reason to be blackmailed or extorted, and making it more difficult for them to apply for and receive state protection.³

² Sexual Orientation and Gender Identity Guidelines, The UNHCR Executive Committee "strongly condemns persecution through sexual violence" and "supports the recognition as refugees of persons whose claim to refugee status is based upon a well-founded fear of persecution, through sexual violence, for reasons of race, religion, nationality, membership of a particular social group or political opinion." UNHCR Exec. Comm., *Conclusion on International Protection No. 73 on Refugee Protection and Sexual Violence* (1993).

³ Sexual Orientation and Gender Identity Guidelines, *see also Pitcherskaia v. INS*, 118 F.3d 641, 646-47 (9th Cir. 1997) (holding that involuntary treatment and confinement, including forced institutionalization, electroshock treatments, and drug injections, even if administered to "cure" a supposed illness due to the applicant's sexual orientation, may constitute persecution).

- d. Persecution may include **psychological assault**. Serious types of humiliation, threats, verbal abuse, intimidation, harassment, being cut off from friends and family, and other behaviours that injure one's mental or emotional health may fall under this category.⁴

Due to the interplay of race, ethnicity, gender, sexual orientation, religion, and nationality, LGBTIQ+ forced migrants encounter multifaceted discrimination in a variety of contexts in their host countries (such as the workplace, housing market, and healthcare system). The term "minority stress," which was primarily coined by Brooks (1981) and Meyer (2003), describes the severe, ongoing stress that members of marginalized minority groups endure. In LGBTIQ+ claims, proving the state's failure to provide protection from damage committed by private actors is sometimes a difficult undertaking. It is not appropriate to claim the existence of NGOs and human rights groups addressing these concerns in the nation of origin as proof of or a replacement for state protection.⁵

CLAIMS FOR LGBTIQ+ ASYLUM BASED ON BELONGING TO A SPECIFIC SOCIAL GROUP

Though it isn't defined in the 1951 Convention, "membership in a particular social group" is one of the five protected grounds. In recent years, it has been used more often in asylum petitions, predominantly in situations involving LGBTIQ+ individuals. At the same time, there has been a rise in lawsuits on this issue in the US, along with measures to limit its use. A specific social group (PSG) is often made up of people with similar backgrounds, habits, or social standing, according to the Handbook. Other UNHCR recommendations give more details on how to properly interpret and analyse participation in a PSG.

There is no "closed list" of organizations that make up a PSG, even while a PSG cannot be "exclusively defined by the fact that it is targeted for persecution. "Open to the diverse and changing nature of groups in various societies and evolving international human rights norms," is another way to think about social groupings. The next subsections provide a summary of pertinent international law norms regarding cognizable groups and nexus and explain how they

⁴ Sexual Orientation and Gender Identity Guidelines; UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugee*, (Sept. 22, 2009) [hereinafter Child Guidelines].

⁵ Summary Conclusions: Asylum-Seekers and Refugees Seeking Protection on Account of their Sexual Orientation and Gender Identity Expert roundtable organized by the United Nations High Commissioner for Refugees, Geneva, Switzerland, 30 September - 1 October 2010

relate to the particular circumstances of LGBTIQ+ asylum petitions filed in the US.⁶ Assault, rape, torture, and compulsion to fit in with social norms around gender roles are a few examples of these crimes. Nevertheless, neither the 1951 Refugee agreement nor any later agreement listed LGBTIQ+ persecution as one of the primary grounds for applying for asylum.⁷

For LGBTI refugees, access to reproductive rights services and LGBTI-sensitive healthcare becomes very difficult at every point of their journey. For example, stopping hormone and other gender transition-related treatments can be very dangerous or result in risky self-medication. Many opt to hide their sexual orientation and gender identity because of fear of being singled out or marginalized, especially in densely crowded regions, even in places where LGBTI refugees are more welcomed and resources are available. Therefore, it is imperative to build safe venues and services in collaboration with LGBTI individuals and their organizations.

CLAIMS MADE BY REFUGEES CONCERNING GENDER IDENTITY AND SEXUAL ORIENTATION

The 1951 Convention's Article 1A (2) poses unique difficulties when deciding refugee claims based on gender identity and sexual orientation. While LGBTI claims have obtained acceptance under the category of "membership of a particular social group," other grounds, such political ideology, have not yet been thoroughly investigated. To prevent gender blindness and dependence on stereotypical notions, it is necessary to consider the variety of concerns raised by these statements.

It is necessary to adequately handle the unique problems that arise in claims made by applicants who identify as transgender, bisexual, or intersex. Effective access to international protection may be hampered by a culture that discriminates against LGBTI people. UNHCR, NGOs, and authorities in asylum-seeking nations must endeavour to guarantee that interview and reception spaces offer a secure area that permits the candidate to tell a story fearlessly.

Unfortunately, some adjudicators frequently ask improper and insensitive questions and, in certain situations, conduct intrusive testing. In order to identify people who do not have

⁶ UNHCR, *Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A (2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*

⁷ Henrique Zanin and Antonio Rodrigues de Freitas Junior, LGBTIQ+ asylum seekers and refugees: Recognition and public policies for protection, *International Journal of Population Studies*, Volume 10 Issue 2, (page-104) (2024)

legitimate claims, interviewing procedures are required. To solve these issues, it is necessary to provide efficient and LGBTI-sensitive interviewing methods and tools as well as ongoing, specialized training for adjudicators, translators, and legal advisers that is adapted to the unique social, legal, and cultural context. Keeping precise information on LGBTI asylum petitions would be very beneficial for states.

PARTICULARS ON LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX REFUGEES AND ASYLUM SEEKERS AS DISTINCT GROUPS

People who identify as lesbian, gay, bisexual, transgender, or intersex all face prejudice and persecution in different ways. Knowing each group's particular vulnerabilities is crucial, especially when determining their status as refugees. Lesbians are more likely to be harmed by private actors and may face discrimination at the nexus of gender and sexual orientation. Since the State is thought to have no role in the injury, persecution of homosexuals is frequently not recognized as connected to a Convention ground. Because they often lead more public lives, gay men are more likely to be harmed by state authorities. Gay males are more vulnerable to physical and sexual abuse while in custody.

The orientation of bisexuality is not well known. Bisexuals' requests for asylum are usually denied because of a lack of credibility and/or an unwillingness to acknowledge bisexuality as a protected trait under the 1951 Convention since their sexual identity is generally viewed as flexible or a matter of choice. Sexual assault against transgender people is common, and they face significant marginalization. Because they are perceived as not conforming to either masculine or female norms, transgender and intersex people frequently endure abuse and harassment. Even though they might not identify as "LGBTI," intersex people may face discrimination because of their nonconformity with gender norms.

CONSIDERATIONS FOR THE PROCEDURAL

In order to address the unique needs of LGBTIQ+ applicants, UNHCR has proposed substantive and procedural measures. These include granting applicants' requests regarding the preferred gender of interviewers or interpreters and providing decision-makers, interviewers, advocates, and legal representatives with specialized training on the claims of LGBTIQ+ asylum seekers. UNHCR has acknowledged that LGBTIQ+ individuals need a supportive and safe environment throughout the asylum adjudication process so that they can present their

claim without fear.

While reducing re-traumatization, a number of strategies may assist LGBTIQ+ people in communicating sensitive material that is essential to deciding their asylum applications. These consist of:

- Building trust between the interviewer and the candidate to foster an atmosphere of openness and comfort that will encourage the sharing of private and sensitive information.
- During registration and protection interviews, self-identified LGBTIQ+ asylum seekers are asked for their chosen name, gender, pronoun, and title.
- Providing further protections for women's claims based on their gender identity and/or sexual orientation, such as conducting interviews with them apart from their families.
- Putting in place further protections for minor applicants, include giving priority processing to their claims and designating a guardian and legal representative.

JURISPRUDENCE ON LGBTIQ APPLICANTS IN INTERNATIONAL PROTECTION

1. *Applicant v State Secretary for Justice*⁸

That discrimination on the basis of sexual orientation may also be a kind of persecution based on belonging to a certain social group. When deciding whether to offer LGBTIQ applicants international protection, a credibility evaluation is crucial. The evaluation can be based on the documented evidence that is in the file, or if there are no papers, it can be based on the applicant's declarations and the application's essential material facts. According to several national courts, revealing one's sexual orientation only after submitting an application might damage one's reputation. However, some courts have held that there may be good reasons why an application could be reluctant to disclose their sexual orientation, and that a credibility determination cannot be made based only on the fact that an applicant did not disclose their sexual orientation right away.

⁸ Netherlands, Council of State [Afdeling Bestuursrechtspraak van de Raad van State], *Applicant v State Secretary for Justice*, D12-51, 13 August 1981.

2. *X v the Federal Republic of Germany*⁹

In February 2022 to ban the repatriation of a transgender trafficking victim to India. The court determined that the applicant posed a real danger to their health if they returned, including a worsening of their post-traumatic stress disorder and severe depression as a result of the violence they had witnessed in India, even if they had withdrawn their appeal. Access to medical care, namely endocrinological treatment in the context of counter-sex hormone therapy, would be hampered by transsexuality. The court further stated that as the applicant had been subjected to sexual abuse and violence from childhood, reintegrating within the applicant's family or the Hijra community would not provide a safe environment.

3. *B and C v Switzerland*¹⁰

The court pointed out that although homosexual behavior is illegal in The Gambia, a removal is not in violation of Article 3 of the Convention only because the destination country has criminal legislation. The court asserts that the practical application of the laws—which was not the case in The Gambia—is the deciding element. Although there were no complaints of specific rogue officer actions, the court pointed out that this may be because to underreporting and a fear of discrimination by the state. Furthermore, reports surfaced of non-state actors' pervasive homophobia and discrimination against LGBTIQ individuals. It additionally concluded that the Swiss authorities' analysis of the state protection's availability was inadequate.

4. *Applicant v State Secretary for Justice and Security*,¹¹

In November 2022, the appeal of an Iranian juvenile who claimed to have been persecuted because of their sexual orientation was denied by the Court of the Hague in the Netherlands. The applicant, who was nearly eighteen at the time of the interview, was judged mature enough to have a good representation of the facts, but the court ruled that there was a lack of trustworthiness and that the applicant did not answer questions or offer adequate information.

⁹ Germany, Regional Administrative Court [Verwaltungsgerichte], *X v the Federal Republic of Germany*, 4 K 2631/20. A, 17 February 2022.

¹⁰ Council of Europe, European Court of Human Rights [ECtHR], *B and C v Switzerland*, applications nos. 43987/16 and 889/19, ECLI: CE: ECHR:2020:1117JUD000088919, 17 November 2020.

¹¹ Netherlands, Court of The Hague [Rechtbank Den Haag], *Applicant (2) v State Secretary for Justice and Security (Staatssecretaris van Justitie en Veiligheid)*, NL21.10059, ECLI:NL: RBDHA:2022:11904, 09 November 2022.

LONG-TERM FIXES OR SOLUTIONS THAT NEEDS TO BE CONSIDERED

Intolerance for LGBTI people is widespread in many first-asylum nations. Therefore, for LGBTI refugees, resettlement may frequently be the only practical, long-term answer. It is necessary to advance risk assessment and vulnerability-based resettlement priority processing. LGBTI refugees may face increased security concerns in their initial asylum countries as a result of the drawn-out resettlement procedure. Countries that handle resettlement must make sure that emergency procedures are in place for LGBTI refugees who are at higher risk, including transit facilities that are considerate of their requirements.

LGBTI refugees can be expensive and challenging to resettle. Some people need continuous financial support and mental health treatment. Many resettlement states do not offer the medical care that transgender and intersex refugees frequently need. Resettlement organizations may hesitate, be unable, or lack the ability or knowledge to offer suitable services to this population, and discrimination based on sexual orientation and gender identity also occurs in these nations to varied degrees. In certain nations, a candidate's prior engagement in sex work may be a barrier to asylum and resettlement. Such behaviour, which is frequently forced, should be regarded as a sign of fragility. With the assistance of sensitive NGOs and other service providers, states and UNHCR must be careful to relocate LGBTI refugees to supportive settings.

LGBTI communities in resettlement nations must also work more to facilitate the better integration of LGBTI refugees. Policies that acknowledge partners of LGBTI refugees can be implemented by states to safeguard the right to family unity. In the first few weeks of their arrival, transgender asylum seekers should get gender-affirming medical therapy (such as hormone replacement and blockers). Suicidality risk will be decreased by taking this topic into consideration.

CONCLUSION

By taking into account the experiences of LGBTIQI+ refugees and asylees both before and after their migration, this systematic review sought to integrate qualitative research on their mental health. The findings show that the main causes of suffering in the lives of LGBT forced migrants are prejudice or violence and the ensuing unresolved mental health issues, barriers to

mental health care, and an inefficient asylum system. Legally unrecognized familial relationships and gender pronouns must be acknowledged by service providers. They ought to identify local networks of LGBTQI+ migrants or refugees as resources for education and referrals.

These results provide new insight into the interrelated elements that affect the target population's welfare in their home countries, while seeking refuge, and following relocation. States, NGOs, scholars, and international organizations are urged to carry on and broaden these initiatives, inspire others to follow suit, and collaborate to enhance the lives of LGBTI refugees and asylum seekers.

